

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

February 2, 2000

IN RE:)
)
PROCEEDING FOR THE PURPOSE OF ADDRESSING) **DOCKET NO. 98-00559**
COMPETITIVE EFFECTS OF CONTRACT SERVICE)
ARRANGEMENTS FILED BY BELL SOUTH)
TELECOMMUNICATIONS, INC. IN TENNESSEE)

**ORDER APPROVING AND ADOPTING
THIRD REPORT AND RECOMMENDATION OF PRE-HEARING OFFICER**

This matter came before the Tennessee Regulatory Authority ("Authority") at a regularly scheduled Authority Conference held on June 8, 1999, for consideration of the Third Report and Recommendation of the Pre-Hearing Officer ("Third Report and Recommendation"), which included consideration of the Pre-Hearing Officer's Order on Petitions and Motions for Reconsideration and Clarification of Order Compelling Discovery ("Reconsideration Order"). After reviewing the Third Report and Recommendation and after hearing comments and objections from the parties, the Directors voted two to one to approve and adopt the Third Report and Recommendation.

On March 25, 1999, the Pre-Hearing Officer issued an Initial Order Compelling Outstanding Discovery ("Initial Order"). Parties were directed in that Order to file any petitions for reconsideration by April 5, 1999. The Initial Order itself provided that any petitions for reconsideration would be considered by the Pre-Hearing Officer at a Pre-Hearing Conference scheduled for April 8, 1999.

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In response to the Initial Order and in advance of the Pre-Hearing Conference, petitions and motions for reconsideration and/or clarification were filed by SECCA (Southeast Competitive Carriers Association); NEXTLINK, Tennessee, Inc; e.spire Communications, Inc.; MCImetro Access Transmission Services, Inc.; Time Warner Communications of the Mid-South, L.P.; and NewSouth Communications, L.L.C. During the Pre-Hearing Conference held on April 8, 1999, the parties were given the opportunity to present oral comments relative to the filed petitions and motions. Certain matters in dispute concerning discovery were resolved by agreement of the parties during the Pre-Hearing Conference or shortly thereafter. The agreements of the parties and the decisions of the Pre-Hearing Officer are reflected in the Reconsideration Order which is attached to and incorporated in the Third Report and Recommendation.

The only issue arising from the motions and petitions that was not resolved at that Pre-Hearing Conference or shortly thereafter was that part of the Initial Order compelling the intervenors to respond to the inquiries of BellSouth Telecommunications, Inc. ("BellSouth") concerning information pertaining to the contract service arrangements (CSAs) of the intervenors. The Pre-Hearing Officer stated in the Initial Order that the secrecy surrounding all CSAs makes a clear analysis of the issues of anti-competitiveness and discrimination virtually impossible. The Pre-Hearing Officer directed all parties to disclose the requested information relative to their CSAs, either subject to the terms of the Protective Order already in place in this proceeding, or subject to a second protective order that would mirror the terms of the existing Protective Order.

During the Pre-Hearing Conference on April 8, the intervening parties argued that the CSAs offered by the intervenors are not relevant to this proceeding and should not be produced. Counsel for BellSouth argued that in order for BellSouth to adequately prepare its defense in a

contested case proceeding, it should be able to review the CSAs of the competing intervenors to make comparisons of terms and conditions of such CSAs, including any termination charges.

The Pre-Hearing Officer affirmed his Initial Order requiring the intervenors to respond to BellSouth's inquiries relative to the intervenors' CSAs. The Pre-Hearing Officer stated that restricting such information from production would be inconsistent with Authority Rule 1220-4-8-.07(3) which requires that competing local exchange carriers ("CLECs") file with the Authority specific information relating to their CSAs and that such information be available for inspection. Further, the Pre-Hearing Officer stated that because the standard for permitting discovery is broader than the standard for the admissibility of evidence, the information pertaining to the intervenors' CSAs should be discoverable and that BellSouth should not be denied the opportunity to review the information in preparation of its case.

During the Pre-Hearing Conference, the parties also discussed the appropriateness of considering certain issues within this proceeding. The consensus of the parties was that the issue of discrimination, as it relates to the offering of CSAs by either BellSouth or by CLECs, should be examined in the context of a rulemaking proceeding.

In conjunction with this discussion, the Pre-Hearing Officer recommended in the Third Report and Recommendation that a rulemaking proceeding be initiated for the purpose of promulgating rules to address industry-wide practices relative to CSAs. The Pre-Hearing Officer further recommended that discovery be completed in this docket (98-00559) prior to initiating such a rulemaking proceeding.

After the Authority's approval of the Second Report and Recommendation in this docket petitions for intervention have been filed by Time Warner, SECCA and Nextlink in separate BellSouth CSA Dockets, Nos. 99-00210, 99-00230, 99-00244 and 99-00262. Because the ultimate issues in this docket are similar, if not identical, to the issues raised in those individual

CSA dockets, the Pre-Hearing Officer recommended that, if the Directors voted to open contested case proceedings and permit the interventions in the individual CSA dockets, the individual dockets should be consolidated with this docket and that the contested cases be conducted as one proceeding. If the Directors were not to open contested case proceedings in the individual CSA dockets, the Pre-Hearing Officer recommended that this docket move to hearing on the list of issues previously approved.

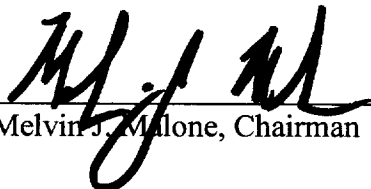
The parties were permitted to comment on the Third Report and Recommendation and the Reconsideration Order at the June 8, 1999 Conference. In response to certain comments made by parties, Chairman Melvin Malone directed the parties to file briefs addressing the following specific threshold issues: who has the burden of proof; what is the relief to be awarded; will the relief only be prospective; whether proceeding with a contested case in this docket would be consistent with the Tennessee Cable decision; and any additional issues that the Pre-Hearing Officer might add to that list by Notice before the close of business on the day of the Conference (June 8, 1999). The parties were instructed to file briefs by close of business on June 15, 1999. The Pre-Hearing Officer was instructed to hold a pre-hearing or status conference on June 24, 1999, to resolve the threshold issues, and to issue an initial order or report resolving those issues within seven (7) days.

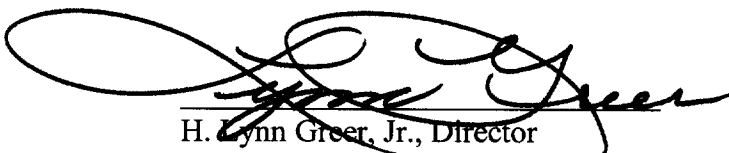
The Authority determined that, in light of the threshold issues to be resolved, certain dates in the Pre-Hearing Officer's proposed schedule could be moved if deemed necessary by the Pre-Hearing Officer. The Directors also commented that the Pre-Hearing Officer should establish an expeditious schedule for resolution of the contested cases. Whereupon, a majority of

the Directors voted to approve and adopt the Third Report and Recommendation, including the Pre-Hearing Officer's Reconsideration Order.¹

IT IS THEREFORE ORDERD THAT:

1. The Third Report and Recommendation of the Pre-Hearing Officer, attached to this Order as **Exhibit 1**, is approved and is incorporated into this Order as if fully rewritten herein; and
2. The parties' objections to the Third Report and Recommendation of the Pre-Hearing Officer are denied.


Melvin J. Malone, Chairman


H. Lynn Greer, Jr., Director


Sara Kyle, Director

ATTEST:


K. David Waddell, Executive Secretary

¹ Initially Chairman Malone did not vote to approve the Third Report and Recommendation, stating that he was hesitant to vote on the Report at that time because it was intertwined with action that the Authority had not yet taken in regard to the interventions filed in Docket Nos. 99-00210, 99-00230, 99-00244 and 99-00262. However, after the interventions were granted in Dockets Nos. 99-00210 and 99-00244, he had no objections to the Third Report and Recommendation.

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BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

OFFICE OF THE
EXECUTIVE SECRETARY

June 1, 1999

IN RE:

PROCEEDING FOR THE PURPOSE OF)
ADDRESSING COMPETITIVE EFFECTS OF) Docket No. 98-00559
CONTRACT SERVICE ARRANGEMENTS FILED)
BY BELL SOUTH TELECOMMUNICATIONS, INC.)
IN TENNESSEE)

THIRD REPORT AND RECOMMENDATION OF PRE-HEARING OFFICER

The history of this proceeding is well documented in the first and second Report and Recommendation filed by the Pre-Hearing Officer on January 15, 1999 and March 23, 1999, respectively.¹ On March 25, 1999, the Pre-Hearing Officer issued an Initial Order Compelling Outstanding Discovery. Parties were directed in that Order to file any petitions for reconsideration by April 5, 1999. The Initial Order itself contained provision for the consideration of the Petitions for Reconsideration by the Pre-Hearing Officer at a Pre-Hearing Conference scheduled for April 8, 1999.

April 8, 1999, Pre-Hearing Conference

Following approval of the Second Report and Recommendation at the April 6, 1999 Authority Conference, a Pre-Hearing Conference was held on April 8, 1999, for purposes of

EXHIBIT 1

considering motions for reconsideration and clarification of the Pre-Hearing Officer's Initial Order Compelling Discovery and of further refining the issues in this proceeding. In attendance at the third Pre-Hearing Conference were the following parties:

BellSouth Telecommunications, Inc. - **Guy M. Hicks**, Esquire and Paul Stinson;
333 Commerce Street, Suite 2101, Nashville, TN 37201;

e.spire, NEXTLINK and Southeastern Competitive Carriers Association ("SECCA")
Henry Walker, Esquire, Boulton, Cummings, Conners & Berry, 414 Union St., #1600,
P. O. Box 198062, Nashville, TN 37219-8062. In addition, **Dana Shaffer**, Esq.
appeared on behalf of NEXTLINK;

Time Warner Communications of the MidSouth, LP and New South
Communications, LLC - **Charles B. Welch, Jr.**, Esquire, 511 Union Street, Suite
2400, Nashville, TN 37219;

MCImetro - **Jon E. Hastings**, Esquire, Boulton, Cummings, Conners & Berry, 414
Union St., 1600, P. O. Box 198062, Nashville, TN 37219-8062;

Consumer Advocate, Office of the Attorney General - **L. Vincent Williams**, Esquire,
and **Vance Broemel**, Esquire, 426 5th Avenue, N., 2nd Floor, Nashville, TN 37243.

AT&T Communications of the South Central States, Inc. ("AT&T") - **James P.
Lamoureux**, Esquire, 1200 Peachtree St., NE, Atlanta, GA 3030.

Petitions and Motions for Reconsideration/Clarification

The following Petitions/Motions were filed in advance of the Pre-Hearing Conference for consideration at the Pre-Hearing Conference:

1. Motion of SECCA (Southeast Competitive Carriers Association) for Clarification and Reconsideration;
2. Petition for Reconsideration of NEXTLINK, Tennessee, Inc. and e.spire Communications, Inc.;
3. Petition for Reconsideration of MCImetro Access Transmission Services, Inc.; and

¹ The First Report and Recommendation was approved by a 2 to 1 vote (Director Greer dissenting) at the January 19, 1999, Authority Conference. The Second Report and Recommendation was approved by a 2 to 1 vote (Director Kyle dissenting) at the April 6, 1999, Authority Conference.

4. Motion to Reconsider of Time Warner Communications of the Mid-South, L.P., and NewSouth Communications, L.L.C.

During the Pre-Hearing Conference, the parties were given the opportunity to present oral comments relative to the filed Motions and Petitions. Certain matters in dispute concerning discovery were resolved by agreement of the parties during the Pre-Hearing Conference or shortly thereafter. These agreements as well as the decisions of the Pre-Hearing Officer are reflected in the Pre-Hearing Officer's Order on Petitions and Motions for Reconsideration and Clarification of Order Compelling Discovery attached to this Report and Recommendation as Exhibit A.

Discussion of the Issues Pertaining to this Proceeding

During the Pre-Hearing Conference, the parties discussed, in the context of discovery, whether certain issues were appropriate for consideration in this proceeding. Of primary concern to the parties was whether the issue of discrimination should continue to be an issue in this docket. This discussion arose in the context of whether the competing intervenors should be required to produce in this proceeding copies of any Contract Service Arrangements that they may have previously offered. The consensus of the parties was that the issue of discrimination as it relates to the offering of contract service arrangements, by either BellSouth or by CLECs, should be examined in the context of a rulemaking proceeding.

Recommendations

The Second Report and Recommendation of the Pre-Hearing Officer contained several options for proceeding with this docket. One option called for initiating a rulemaking proceeding at the conclusion of discovery in this docket. Such a rulemaking proceeding could address the practices of offering CSAs on an industry-wide basis. The Pre-Hearing Officer recommended, at that time, that discovery be completed in this proceeding prior to initiating such a rulemaking proceeding.

After the filing and approval of the Second Report and since the time of the Pre-Hearing Conference on April 8, 1999, petitions for interventions have been filed by Time Warner, SECCA and Nextlink in BellSouth individual CSA Docket Nos. 99-00210, 99-00230, 99-00244 and 99-00262. Prior to the filing of these petitions, there had been no request to intervene nor for the initiation of contested case proceedings by any interested party in the individual CSA dockets filed by BellSouth. These intervention requests will be considered by the Directors at the June 8, 1999, Authority Conference.

The Pre-Hearing Officer is of the opinion that the ultimate issues in this proceeding will be similar, if not identical, to the issues raised in these individual CSA dockets. In the event that the Directors vote to open contested case proceedings and permit the interventions in the individual CSA dockets, the Pre-Hearing Officer **recommends** that the individual dockets be consolidated with this proceeding and that the proceeding be conducted as one contested case proceeding. As to the generic issues in this proceeding, discovery is almost completed. Discovery could now be conducted as to the specific issues surrounding the individual CSAs.

The Pre-Hearing Officer further **recommends** that a rulemaking proceeding be initiated through the opening of another docket, as soon as practicable, for the purpose of promulgating rules that will address industry-wide practices of offering Contract Service Arrangements. The Pre-Hearing Officer **recommends** that the contested case proceeding (Docket 98-00559) move along on an expedited schedule toward resolution.

If the Directors vote not to open contested case proceedings in the individual CSA dockets, the Pre-Hearing Officer **recommends** that this proceeding move to hearing on the list of issues previously approved and further **recommends** the following schedule for completion:

Completion of discoveryJune 18, 1999
(Including all Responses as
ordered by the Pre-Hearing Officer)

Filing of Pre-Filed Direct Testimony.....June 28, 1999

Filing of Pre-Filed Rebuttal Testimony.....July 7, 1999

Respectfully submitted,



RICHARD COLLIER, ACTING AS
PRE-HEARING OFFICER

ATTEST:


EXECUTIVE SECRETARY

DATE: June 1, 1999



BellSouth Telecommunications, Inc.
Suite 2101
333 Commerce Street
Nashville, Tennessee 37201-3300

815 214-6301
Fax 815 214-7406

Guy M. Hicks
General Counsel

April 13, 1999

Vance Broemel, Esquire
Consumer Advocate Division
426 5th Avenue, N., 2nd Floor
Nashville, TN 37243

Re: *Proceeding for the Purpose of Addressing Competitive Effects of Contract Service Arrangements Filed by BellSouth Telecommunications, Inc.*
Docket No. 98-00559

Dear Vance:

Thank you very much for your letter of April 12 proposing a solution to the discovery dispute involving BellSouth and the Consumer Advocate Division over your office's discovery requests numbers 8 and 9. As discussed this morning, we have reached the following agreement. If BellSouth believes that any documents responsive to requests 8 and 9 contain "marketing strategy", BellSouth may redact the documents so as to delete dollar amounts, percentages, the names of customers and specific marketing strategy information; if the Consumer Advocate Division believes that the deleted information is necessary and should be revealed, it can submit the matter to the Hearing Officer for resolution.

Since we have reached agreement, I will provide a copy of this letter to Mr. Richard Collier, the Hearing Officer.

Very truly yours,

Guy M. Hicks

GMH:ch

cc: Richard Collier, Esquire

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BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

June 1, 1999

IN RE:)
)
PROCEEDING FOR THE PURPOSE OF) **Docket No. 98-00559**
ADDRESSING COMPETITIVE EFFECTS OF)
CONTRACT SERVICE ARRANGEMENTS FILED)
BY BELL SOUTH TELECOMMUNICATIONS, INC.)
IN TENNESSEE)

**PRE-HEARING OFFICER'S ORDER ON PETITIONS AND
MOTIONS FOR RECONSIDERATION AND CLARIFICATION
OF ORDER COMPELLING DISCOVERY**

On March 25, 1999, the Pre-Hearing Officer issued an Initial Order on Motions to Compel Outstanding Discovery ("Initial Order"). Pursuant to the provisions of that Order, parties were permitted to file petitions for reconsideration with the Pre-Hearing Officer for consideration at a Pre-Hearing Conference scheduled for April 8, 1999. In response to the Pre-Hearing Officer's Initial Order and in advance of the Pre-Hearing Conference, the following motions or petitions were filed:

1. Motion of SECCA (Southeast Competitive Carriers Association) for Clarification and Reconsideration;
2. Petition for Reconsideration of NEXTLINK, Tennessee, Inc. and e.spire Communications, Inc;
3. Petition for Reconsideration of MCImetro Access Transmission Services, Inc; and
4. Motion to Reconsider of Time Warner Communications of the Mid-South, L.P. and NewSouth Communications, L.L.C.

EXHIBIT

A

All of the above-listed petitions or motions were considered by the Pre-Hearing Officer at the April 8th Pre-Hearing Conference during which all parties were given the opportunity to provide oral comments. After reviewing the original discovery requests and responses, the parties' motions to compel discovery, the Initial Order, the motions and petitions for reconsideration and/or clarification and after considering comments from the parties at the April 8, 1999 Pre-Hearing Conference, the Pre-Hearing Officer makes the following rulings concerning the respective petitions and motions for reconsideration and/or clarification.

SECCA'S MOTION FOR CLARIFICATION AND RECONSIDERATION

1. In its First Data Request Nos. 5, 6, 7 and 8, BellSouth Telecommunications, Inc. ("BellSouth") asked SECCA if a competing local exchange carrier ("CLEC") offered a Contract Service Arrangement ("CSA") which was equivalent to a BellSouth CSA, would it be anti-competitive or discriminatory, and if the answer was no, please explain why not. In the same vein, BellSouth asked SECCA if any CSA offered by a CLEC is anticompetitive or discriminatory, and if yes, to identify: the effective date of the CSA; the services provided; and the offending terms, conditions, or provisions. In response to those requests SECCA stated that it did "not at this time have a position" on these issues, and objected to the request as irrelevant.

BellSouth moved to compel on the grounds that "information concerning special contracts offered by BellSouth's competitors is relevant to this proceeding because such information tends to prove material issues concerning the competitiveness of BellSouth's

CSAs.” SECCA responded that because BellSouth has the ability to impair competition, an ability that CLECs do not have, any data request relative to the CLEC’s CSAs have no relevance to this proceeding.

In the Initial Order, the Pre-Hearing Officer ruled that the information pertaining to CLEC’s CSAs is relevant to this investigation as it may prove material issues concerning the competitiveness of BellSouth’s CSAs. Further, the Pre-Hearing Officer ruled that BellSouth is entitled to learn whether SECCA contends that a special contract offered by a competitor of BellSouth would be permissible, as well as what particular provisions in CSAs are anticompetitive or discriminatory, regardless of the identity of the carrier.

SECCA has sought clarification of the Initial Order as to whether SECCA, as an organization, would be required to produce or comment on the CSAs of its individual members. During the April 8th Pre-Hearing Conference, in response to SECCA’s motion, the Pre-Hearing Officer clarified the Initial Order and ruled that the Initial Order does not require SECCA, as an organization, to produce or respond regarding the CSAs of the individual members of that organization. Counsel for SECCA asserted at the Pre-Hearing Conference that SECCA intends to participate as a full party in this proceeding and would respond, as to the discriminatory or anti-competitive impact of any CSAs introduced into evidence by other parties, including CSAs that may pertain to members of SECCA. Accordingly, SECCA will comply with the Initial Order and respond to BellSouth’s Data Requests Nos. 5, 6, 7 and 8, asserting its position as an organization to those data requests.

2. SECCA has sought clarification as to the extent to which SECCA and the Consumer Advocate Division of the Office of the Attorney General (“Consumer Advocate”)

may share information concerning the costs of BellSouth's CSAs. SECCA requested that the Pre-Hearing Officer direct any information obtained by the Consumer Advocate in TRA Docket No. 97-01105, relevant to this proceeding, be shared by the Consumer Advocate with the other intervenors in this proceeding.

On this issue, the Pre-Hearing Officer heard oral comments from counsel for BellSouth and from the Consumer Advocate, as well as from counsel for SECCA. Counsel for BellSouth expressed concern that SECCA's request was another attempt to consolidate TRA Docket No. 97-01105 with this proceeding. This issue has been resolved through an agreement of BellSouth, the Consumer Advocate and SECCA whereby the documentation produced by BellSouth in TRA Docket No. 97-01105 will be available for inspection and copying in this proceeding pursuant to the Protective Order entered in this proceeding. The restrictions imposed upon the Consumer Advocate by the protective agreement between BellSouth and the Consumer Advocate in TRA Docket No. 97-01105, (e.g., prohibiting the sharing of documentation or of the information with persons outside of the Consumer Advocate's office) shall not be applicable to the production of that documentation in this proceeding. The parties in this proceeding may discuss and share information concerning that documentation, provided that all parties adhere to the restrictions imposed by the protective order in this proceeding.

3. In its Motion, SECCA has requested that the Pre-Hearing Officer reconsider that portion of the Initial Order denying the Consumer Advocate's Motion to Compel responses from BellSouth to Items 8 and 9 of the Consumer Advocate's Second Set of Discovery

Requests.¹ In Items 8 and 9, BellSouth was asked to produce for inspection and copying all reports, memoranda, internal correspondence, studies, analyses, minutes of board meetings, instructions to account teams, directives, operating procedures, marketing procedures, analyses of customers bills and other records, instructions that address how such analyses or studies were to be performed, etc., prepared by or for BellSouth that: (Item 8) address the offering of CSAs as a means of retaining customers in a competitive environment, or otherwise protecting the stream of revenue from customers who may be offered service by competing carriers; and (Item 9) identify the characteristics of a BellSouth customer that should be considered as a candidate for a CSA.

BellSouth objected to these requests as exceedingly broad, particularly to the extent that they sought information concerning BellSouth's marketing strategy, which BellSouth maintains is not relevant to any of the approved issues in this proceeding nor reasonably likely to lead to discovery of admissible evidence. Further, BellSouth contended that it has made an extensive amount of information available, subject to the Protective Order, for inspection at its offices in Nashville and that the Consumer Advocate had not availed itself of the opportunity to review that information.

The Consumer Advocate contended in its Motion to Compel that the information was relevant because it could show under Item 8 that BellSouth has a deliberate, anti-competitive marketing strategy to use CSAs to cut off any potential competition, and under Item 9 that

¹ It should be noted that the Consumer Advocate did not file a petition for reconsideration as to the Pre-Hearing Officer's Initial Order.

BellSouth targets certain customers as part of a strategy to remove lucrative accounts from competition.

In the Initial Order, the Pre-Hearing Officer ruled that while Items 8 and 9 sought information relevant to the issues in this docket, the requests were over-broad in seeking to discover BellSouth's marketing strategy, and as phrased, infringed upon BellSouth's proprietary interests. The relevance of the requested information was weighed against the detriment to BellSouth by its disclosure. Upon reviewing the approved *List of Issues*, the Pre-Hearing Officer found no issue directly pertaining to BellSouth's marketing strategy. On these grounds the Pre-Hearing Officer denied the Consumer Advocate's motion to compel answers from BellSouth to Items 8 and 9 of the Consumer Advocate's Second Set of Discovery Requests.

At the April 8th Pre-Hearing Conference, the Pre-Hearing Officer received oral comments from the parties pertaining to reconsideration of the denial of the Consumer Advocate's Motion to Compel responses to Items 8 and 9. Counsel for SECCA and the Consumer Advocate argued the importance of discovering such documents to determine BellSouth's marketing strategy for retaining customers in a competitive environment. This, they argued, was at the heart of this proceeding. Counsel for BellSouth argued that it would not be necessary to delve into memoranda relating to marketing strategy in order to determine whether a CSA is discriminatory or anti-competitive. BellSouth also claimed that it would be harmed and prejudiced by revealing specific marketing strategies to its competitors.

After much discussion on this issue, counsel for BellSouth, the Consumer Advocate and counsel for SECCA agreed to work together to revise the requests in Items 8 and 9 in

such a manner that the requests would not seek the production of any particular trade secrets or business plan such as would cause specific harm or prejudice to BellSouth. On April 13, 1999, the Pre-Hearing Officer received a copy of a letter from BellSouth to the Consumer Advocate confirming that the parties had reached a solution to the dispute concerning Items Nos. 8 and 9. A copy of BellSouth's letter is attached to this Order as **Exhibit 1.**

PETITION FOR RECONSIDERATION OF NEXTLINK TENNESSEE, INC. AND e.spire COMMUNICATIONS, INC.

NEXTLINK Tennessee, Inc. ("NEXTLINK") and e.spire Communications, Inc. ("e.spire") initially petitioned for reconsideration of that portion of the Initial Order that required the parties to set forth their positions regarding the "legal and policy issues surrounding BellSouth's CSA's." During the April 8th Pre-Hearing Conference, counsel for NEXTLINK and e.spire further articulated their objection that the Initial Order required the parties to provide their positions as to ultimate issues in this proceeding through responses to discovery, rather than to provide their positions through pre-filed testimony. For example, in BellSouth's First Data Requests Nos. 2 and 3, the Competing Intervenors were asked whether they contended that any BellSouth CSA is anti-competitive, and if the answer was yes, to identify with specificity: the applicable CSA by number; the offending terms, conditions, or provisions; and all facts and documents that support such a contention. When the Intervening Parties responded that they had no position at the present time or simply deferred their response to the filing of pre-filed testimony, BellSouth filed a motion to compel responses. In granting that portion of BellSouth's Motion to Compel, the Pre-Hearing Officer stated that

the standard for intervention is different from the standard for discovery, and that while a party's position may change over the course of the proceeding, it is necessary for all intervenors to clearly articulate their current positions on the threshold issues of this proceeding. The Pre-Hearing Officer ruled that the parties have had sufficient time since the inception of discovery to review BellSouth's CSAs and therefore directed them to respond to BellSouth's requests.

Although most of the intervenors were compelled to respond pursuant to the Initial Order, only NEXTLINK and e.spire petitioned for reconsideration on this issue and presented oral comments on this ruling at the Pre-Hearing Conference. Counsel for NEXTLINK and e.spire expressed, as a primary concern, the inability to articulate a complete response in the midst of discovery which, in turn, would create a need to update responses as more information became available. Counsel also expressed concern that a premature response during discovery could be used as a basis for impeachment should the party's position change at a later time in the proceeding. Counsel for BellSouth argued that it was entitled to learn, as early as practicable in the proceeding, the positions of the intervenors and it should not have to wait to learn of those positions until the filing of pre-filed testimony.

After full discussion of this issue, counsel for BellSouth and counsel for NEXTLINK and e.spire reached an agreement as to BellSouth's motion to compel. NEXTLINK and e.spire will answer the data requests in question to the best of their abilities based on the information available at the present time and will update its response should additional material information become available. The parties' final position as to the ultimate issues will be reflected in the parties' pre-filed testimony and/or pre-hearing briefs. Responding to

the questions in this manner will alleviate BellSouth's concern of not knowing the parties' position until immediately before the hearing.

Since no other parties petitioned for reconsideration on this ruling, the Initial Order has become final as to those parties and they are required to respond to BellSouth's First Data Requests, as set forth in the Initial Order.

PETITION FOR RECONSIDERATION OF NEXTLINK TENNESSEE, INC. AND e.spire COMMUNICATIONS, INC., MOTION TO RECONSIDER OF TIME WARNER COMMUNICATIONS OF THE MID-SOUTH, L.P. AND NEWSOUTH COMMUNICATIONS, L.L.C. AND PETITION FOR RECONSIDERATION OF MCIMETRO ACCESS TRANSMISSION SERVICES, INC.

NEXTLINK, e.spire, Time Warner Communications of the Mid-South, L.P. ("Time Warner") NewSouth Communications, L.L.C ("NewSouth") and MCImetro Access Transmission Services, Inc. ("MCImetro") all filed for reconsideration of the directive in the Initial Order requiring the Intervening parties to file copies of their CSAs in response to BellSouth's Data Requests seeking information relating to CSAs that such Intervening Parties may be offering. In BellSouth's First Data Requests Nos. 6, 7, 8, 9, 10, 12, and 13, the Competing Intervenors were asked whether they have entered into any CSAs since January 1, 1994, and if yes, specify effective date, term, service, and differences from GSST. They were asked if any of these CSAs contain termination provisions, and if yes, identify and describe that termination provision. Further, the Intervenors were asked if any customer had been assessed or had paid termination charges, and if so, specify the person, the CSA, the amount and method by which such charge was calculated. Finally, they were asked if the CSAs are available to similarly situated customers, and if yes, describe the criteria and procedures for

determining similarly situated customers and identify all supporting documents. In their responses, AT&T, NewSouth, Time Warner and MCImetro claimed that such information was "irrelevant to this proceeding and not calculated to lead to the discovery of admissible evidence." BellSouth filed a motion to compel responses to these data requests.

The Pre-Hearing Officer stated in the Initial Order that the secrecy surrounding all CSAs makes a clear analysis of the issues of anti-competitiveness and discrimination virtually impossible. The Pre-Hearing Officer directed all parties to disclose the requested information relative to their CSAs, either subject to the terms of the Protective Order already in place in this proceeding, or subject to a second protective order that would mirror the terms of that protective order.

During the Pre-Hearing Conference on April 8, all of the parties present contributed to the discussion of whether the CSAs of the CLECs should be produced for inspection in this docket. The intervening parties argued that the CSAs offered by the CLECs are not relevant and should not be produced. Counsel for BellSouth argued that in order for BellSouth to adequately prepare its defense in a contested case proceeding, it should be able to review the CSAs of the Competing Intervenors to make comparisons of terms and conditions such as termination charges.

In the Second Report and Recommendation and again during the April 8th Pre-Hearing Conference, the Pre-Hearing Officer made reference to the requirements of Authority Rule 1220-4-8-.07(3) governing CSAs offered by competing local exchange carriers (CLECs). Authority Rule 1220-4-8-.07(3) contains the following language:

(3) Special Contract Provisions

- (a) Special contracts and any tariffs for interconnection services shall comply with the provisions of Rule 1220-4-8-.10.
- (b) Special contracts with end users which are not unduly discriminatory shall be permitted. However, **the Commission shall be notified of the existence of the contract upon execution, and shall be provided with a written summary of the contract provisions including a description of the services provided. The Commission shall make a copy of the summary available for inspection by any interested party. A copy of the contract shall be made available for Commission review upon request.**
- (c) Any special pricing package, contract, or discount shall be made available to any similarly situated customer satisfying the required terms and conditions of the special agreement upon request.
(Emphasis supplied.)

The Pre-Hearing Officer is of the opinion that a ruling to restrict the production of information pertaining to the CSAs of the Intervenors in this docket would be inconsistent with the above-cited Authority rule that requires certain information be filed with the Authority and be available for inspection "by any interested party." From the discussion at the Pre-Hearing Conference, it is apparent that the CLECs have not been complying with Authority Rule 1220-4-8-.07(3). Further, since the standard for permitting discovery is broader than the standard for the admissibility of evidence, the Pre-Hearing Officer is of the opinion that the information is, in the very least, discoverable and that BellSouth should not be denied the opportunity to review the information in preparation of its case.

After reconsidering the decision in the Initial Order and after considering the petitions and motions and oral comments of the parties as to this issue, the Pre-Hearing Officer affirms his original position and directs the Competing Intervenors to respond to BellSouth's First Data Requests Nos. 6, 7, 8, 9, 10, 12, and 13 by providing the information requested in

compliance with Authority Rule 1220-4-8-.07(3). To the extent that the Intervening Parties consider certain information as proprietary, such information can be produced subject to the Protective Order already in place in this proceeding or subject to a second protective order that the parties may wish to have entered in this proceeding. Further, in compliance with Authority Rule 1220-4-8-.07(3), the intervening CLECS are directed to file in this docket the summaries of any CSAs into which they have entered.

IT IS THEREFORE ORDERED THAT:

1. As to the Motion of SECCA (Southeast Competitive Carriers Association) for Clarification, the Initial Order of Pre-Hearing Officer is clarified as follows:

- a. SECCA will comply with the Initial Order, as set forth herein and respond to BellSouth's Data Requests Nos. 5, 6, 7 and 8, asserting its position as an organization to those data requests.
- b. The documentation produced by BellSouth in TRA Docket No. 97-01105 will be available for inspection and copying in this proceeding pursuant to the Protective Order entered in this proceeding. The parties in this proceeding may discuss and share information concerning that documentation, provided that all parties adhere to the restrictions imposed by the Protective Order in this proceeding.

2. The Motion of SECCA (Southeast Competitive Carriers Association) for Reconsideration is granted and the Pre-Hearing Officer hereby rescinds that portion of the Initial Order denying the Consumer Advocate's Motion to Compel responses from BellSouth

to Items 8 and 9 of the Consumer Advocate's Second Set of Discovery Requests based on the Agreement of the parties as reflected in Exhibit 1 of this Order.

3. As to the Petition for Reconsideration filed by NEXTLINK, Tennessee, Inc. and e.spire Communications, Inc. relating to complete responses to BellSouth data requests, NEXTLINK and e.spire will answer the data requests to the best of their abilities based on the information available at the present time and will update their responses should additional material information become available. The parties' final position as to the ultimate issues will be reflected in the parties' pre-filed testimony and/or pre-hearing briefs.

4. The Petition for Reconsideration of NEXTLINK, Tennessee, Inc. and e.spire Communications, Inc., the Petition for Reconsideration of MCImetro Access Transmission Services, Inc. and the Motion to Reconsider of Time Warner Communications of the Mid-South, L.P. and NewSouth Communications, L.L.C. seeking reconsideration of the Initial Order requiring the Intervenors to file information and documentation pertaining to the Contract Service Arrangements that they may be offering are denied. To the extent that the Intervening Parties consider certain information as proprietary, such information can be produced subject to the Protective Order already in place in this proceeding or subject to a second protective order that the parties may wish to have entered in this proceeding. Further, in compliance with Authority Rule 1220-4-8-.07(3), the intervening CLECS are directed to file in this docket the summaries of any CSAs into which they have entered.

5. This Order will be considered by the Authority at the June 8, 1999, Authority Conference as a part of its consideration of the Pre-Hearing Officer's Report and

Recommendation, and any party aggrieved by this Order may seek review of this Order by the Authority during that Conference.

Richard Collier
RICHARD COLLIER, ACTING AS
PRE-HEARING OFFICER

ATTEST:

KD Waddell
K. David Waddell, Executive Secretary

Date: June 1, 1999